Supreme Court, U.S.
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No. 99-803

IN THE

Supreme Court of the United States

JOHN HAMM, *et al.*,

Petitioners,

v.

RHÔNE-POULENC RORER PHARMACEUTICALS INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT RHÔNE-POULENC RORER PHARMACEUTICALS INC.

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QUESTIONS PRESENTED

Whether this Court should grant certiorari to issue an advisory opinion on the question whether injury to a person's reputation constitutes injury to "business or property" under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), when there is no split of authority among the circuits and the issue is not case dispositive?

Whether this Court should grant certiorari to issue an advisory opinion on the question whether plaintiffs had standing to sue under § 1962(d) for retaliatory discharge in furtherance of a RICO conspiracy when the claim based on discharge was withdrawn below and the issue is not case dispositive?

STATEMENT PURSUANT TO RULE 29.6

In accordance with Rule 29.6 of the Rules of this Court, respondent Rhône-Poulenc Rorer Pharmaceuticals Inc. states that it is an indirect, wholly-owned subsidiary of Rhône-Poulenc Rorer Inc. Rhône-Poulenc Rorer Inc. is a wholly-owned subsidiary of Rhône-Poulenc S.A. American depository receipts of Rhône-Poulenc S.A. are traded on the New York Stock Exchange. Subject to regulatory and shareholder approvals, Rhône-Poulenc S.A. and Hoechst A.G. plan to merge their life sciences activities (pharmaceuticals, animal and plant health) effective December 15, 1999. Following the merger, the ultimate parent of Rhône-Poulenc Rorer Inc. will be Aventis (which will be the new name of Rhône-Poulenc S.A.).

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INTRODUCTION

Plaintiffs seek review of a summary judgment entered by the United States District Court for the District of Minnesota and affirmed by the Eighth Circuit. Plaintiffs are four former employees of defendant-respondent, Rhône-Poulenc Rorer Pharmaceuticals Inc. ("RPR"). Plaintiffs allege that RPR improperly marketed four of its pharmaceutical products with intent to induce hospitals and others to purchase these products for uses not approved by the United States Food and Drug Administration. Pet. App. E-8 at ¶ 22. Plaintiffs do not claim that, as employees, they were directly damaged by this marketing activity. Rather, plaintiffs alleged *initially* that they were damaged by retaliatory employment action taken against them for criticizing or refusing to participate in the alleged activity. *Later*, however, when plaintiffs encountered resistance to their claim in the District Court, they blithely changed their factual allegations and claimed that they actually participated in the challenged marketing activities and that their reputations were damaged as a result. Pet. App. A-18, C-11.

Plaintiffs sued in federal court, basing jurisdiction upon the Racketeer Influenced and Corrupt Organizations Act ("RICO") and appending several state law claims. The District Court entered judgment on the RICO claim for failure to state a claim and dismissed the state law claims for lack of subject matter jurisdiction. The District Court dismissed the RICO claims on four grounds: (1) plaintiffs lacked standing under RICO to sue for their indirect injury; (2) plaintiffs' alleged injury to their reputations did not constitute injury to "business or property" as required under RICO; (3) the RICO statute is not intended to reward with treble damages persons who knowingly participate in the

alleged racketeering activity; and (4) plaintiffs could not state a claim for injury to reputation based upon acts that they voluntarily carried out. Pet. App. C-19 - C-20. The United States Court of Appeals for the Eighth Circuit affirmed. Pet. App. A-20.

Now, plaintiffs seek review of their case by this Court. In so doing, however, plaintiffs challenge only two of the bases underlying the judgment below. As to their RICO claim under § 1962(c), plaintiffs ask this Court to consider whether injury to personal reputation constitutes injury to "business or property." As to their RICO claim under § 1962(d), plaintiffs ask this Court to consider whether they can sue for injury caused by a non-racketeering overt act in furtherance of a RICO conspiracy. Because the two issues raised by plaintiffs do not address all the independent grounds for the entry of the judgment below, even a successful appeal to this Court should not change the result below.

RPR respectfully submits that this Court should decline to grant certiorari. First, with respect to plaintiffs' initial issue, the Eighth Circuit properly held that injury to reputation is a personal injury and does not constitute injury to business or property as required by RICO. Because there is no split among the circuits on this issue and the Eighth Circuit's decision is in accord with the case law, there is no reason to grant certiorari to consider that issue. With respect to plaintiffs' second issue, plaintiffs changed their factual allegations, withdrew their claim, and substituted a new claim that would grossly distort RICO by allowing participants in racketeering activities to recover for reputational injury. There is no reason for the Court to consider such a strained and novel reading of the statute. Third, and finally, this Court should deny certiorari because the two issues raised by

plaintiffs are not case dispositive. Due to the existence of alternative grounds underlying the judgment, any opinion from this Court would necessarily be advisory in nature.

STATEMENT OF FACTS

A. The Parties

Plaintiffs are four individuals who reside in Texas, Maryland and Pennsylvania. Pet. App. E-4 at ¶¶ 4-7. Plaintiffs Hamm and Bohm were employed by RPR as sales representatives. Pet. App. E-4 at ¶¶ 4, 7. Plaintiff Conolly was employed by RPR as a data entry clerk, promotional literature coordinator and promotional event coordinator, and plaintiff DeCembrino was employed as a supervisor of budget and promotion. Pet. App. E-4 at ¶¶ 5-6.

RPR is a Delaware corporation with its principal place of business in Collegeville, Pennsylvania. Among other things, RPR manufactures and sells pharmaceutical products. Defendant Robert A. Becker is an advertising agency in New York which plaintiffs allege also operates under the fictitious name Genecom. Pet. App. E-5 at ¶ 10. Defendant Alexander Turpie is a medical doctor who resides in Canada. Pet. App. E-5 at ¶ 11.

Plaintiffs instituted this action on June 3, 1997 by filing a Complaint in the United States District Court for the District of Minnesota. Plaintiffs sued on their own behalf and purportedly on behalf of a class of RPR employees alleged to be similarly situated. On June 13, 1997, plaintiffs filed a First Amended Complaint as a matter of right, and on September 2, 1997, Magistrate Judge John M. Mason granted them leave to file a Second Amended Complaint.

B. Second Amended Complaint

In their Second Amended Complaint, plaintiffs alleged that RPR illegally marketed four of its pharmaceutical products. Those products are Lovenox®, Nasacort AQ®, Taxotere® and Rilutek® (the "RPR Products"), products widely used in the treatment of blood clotting, asthma, cancer, and ALS, respectively. In particular, plaintiffs alleged: (i) that RPR promoted the RPR Products for uses not indicated on the FDA-approved label (sometimes referred to as "off-label" uses) in violation of the Food, Drug and Cosmetic Act; and (ii) that RPR compensated physicians for prescribing these products in violation of the Medicare/ Medicaid Antikickback Statute. Pet. App. E-7 - E-16 at ¶¶ 20-41. Specifically, it was alleged that RPR provided information regarding off-label uses of Lovenox® to its salespeople, encouraged its salespeople to solicit physicians who would prescribe Lovenox® for off-label uses, arranged for speaking events for physicians who used the RPR products for off-label uses, set sales quotas that implicitly included off-label sales of the RPR products, made allegedly improper payments to doctors to serve as speakers, and paid physicians to encourage off-label uses of the RPR products. Plaintiffs allege these activities were carried out through the mail and by wire and constitute racketeering activity.

Plaintiffs did not claim that they were injured or damaged by this marketing activity. Indeed, plaintiffs alleged that the purpose or intent of the activity was "to defraud hospital administrators, physicians, and other medical personal [sic] into prescribing or purchasing [RPR] products." Pet. App. E-8 at ¶ 22. In their Second Amended Complaint, plaintiffs alleged that their injuries occurred because they criticized and refused to participate in the alleged promotional activity

and RPR retaliated against them. In particular, plaintiffs alleged that they and the other purported class members were "terminated, denied promotional opportunities, denied compensation rewards, lost stock option plans, deprived of pension benefits and subjected to intimidation and harassment, and defamed for either refusing to participate in the illegal promotion of Off-Label usage of [RPR] products and kickbacks to parties committing to use of its products." Pet. App. E-6 at ¶ 13. Plaintiffs claimed they were entitled to recover their alleged damages under the Racketeer Influenced Corrupt Organizations Act ("RICO") and state law.

On June 26, 1997, RPR filed a motion to dismiss asserting that the plaintiffs had not alleged a direct injury arising from the alleged racketeering acts and, therefore, lacked standing to assert claims under RICO. On August 1, 1997, plaintiffs filed a memorandum of law in opposition to RPR's motion to dismiss. Therein, plaintiffs alleged for the first time that the primary focus of their RICO claims was not any adverse employment action, but rather injury to their "business reputations" arising from association with the purported racketeering activities.

C. Oral Argument Before Magistrate Judge Mason

The District Court referred the motion to dismiss to Magistrate Judge John M. Mason. The Magistrate Judge heard extensive oral argument on September 2, 1997 and questioned plaintiffs' counsel closely regarding the absence of a direct injury. Plaintiffs conceded that, under the controlling law, they could not base a RICO claim upon allegations of wrongful discharge, denial of promotional opportunities, loss of compensation or benefits, harassment,

intimidation, or retaliation. Pet. App. A-5, C-10. This left plaintiffs with only their claim that they had been "defamed" or "self-defamed" and had suffered injuries to their reputations. Pet. App. A-5, C-17 - C-18. Plaintiffs conceded during the argument, moreover, that they were not defamed for "refusing to participate" in the alleged racketeering conduct (as pleaded in their Second Amended Complaint). Pet. App. A-5 - A-6, C-10, C-18. Thus, as Magistrate Judge Mason noted in his Report and Recommendation, plaintiffs admitted at the hearing that "none of the pleaded allegations of the Second Amended Complaint could give rise to a RICO claim" and "essentially withdrew these allegations." Pet. App. C-11 n.3, C-12.

In an attempt to save their RICO claims, however, plaintiffs asked the Court to consider new facts and an unpleaded theory of recovery. Pet. App. C-11. Specifically, at the argument before the Magistrate Judge, plaintiffs claimed for the first time that they had suffered injury to their business reputations not because they criticized the allegedly illegal marketing activities, but rather because they had actually participated in that conduct. Pet. App. A-18, C-11. This theory, and the facts underlying it, appeared nowhere in the original or amended complaints and, indeed, were directly contrary to plaintiffs' allegations that they had refused to participate in any allegedly illegal activity. Pet. App. C-11. Nevertheless, plaintiffs presented these new facts to the Magistrate Judge during argument (claiming "oversight" as the reason for not having presented them sooner) and asked the court to deny the motion to dismiss on that basis. Hence, when the record closed in the District Court, plaintiffs were relying on their allegation that they had participated in the alleged improper marketing activity,

that their reputations had been injured as a result, and that these facts gave them a claim under RICO.

D. The District Court's Decision

On September 18, 1997, the Magistrate Judge issued his Report and Recommendation. He recommended that the RICO claim be dismissed for failure to state a claim and that the state law claims be dismissed for lack of subject matter jurisdiction. The Magistrate Judge noted that plaintiffs had admitted that "none of the pleaded allegations of the Second Amended Complaint could give rise to a RICO claim[.]" Pet. App. C-11 n.3. Turning to plaintiffs' new allegations that they had participated in the alleged racketeering activity and suffered injuries to their reputations, the Magistrate Judge held that those allegations did not create a cause of action under RICO for four reasons. First, any alleged injury to reputation was not the direct or proximate result of participating in the alleged racketeering activity. Pet. App. C-19. Second, the RICO statute only permits recovery for injury to "business or property" and harm to an individual's reputation does not so qualify. Pet. App. C-20. Third, the RICO statute is not intended to reward persons who knowingly participate in the alleged racketeering activity. Pet. App. C-20. And fourth, the plaintiffs could not claim injury from alleged defamation, as theorized, because they had admitted to participating in the alleged wrongdoing. Pet. App. C-20.

Plaintiffs filed objections to the Report and Recommendation on October 3, 1997. In those objections, plaintiffs stated: "The focus for purposes of the RICO claims is upon the fact that the Defendants prayed [sic] upon the business reputations of Plaintiffs and used them to further

their illegal scheme. The direct result of this conduct is an injury to their business reputations." Plaintiffs only mention of adverse employment actions in their objections was to deny that they were the basis of their RICO claims.

Soon after filing their objections, plaintiffs sought voluntarily to dismiss their claims. In a brief filed with the Court on November 14, 1997, plaintiffs stated that "a dismissal with [sic] prejudice at this stage will save this Court time by providing the parties an opportunity to discover more facts which will make a determination at a later date more expedient in this court or another forum." Faced with the argument that they were seeking to engage in forum shopping, plaintiffs responded that "[i]t is for another judge to decide if a claim brought in their court is founded on bad faith, not this court."[1]

On November 25, 1997, the Honorable David S. Doty issued an Opinion adopting the Magistrate Judge's Report and Recommendation and denying plaintiffs' motion to voluntarily dismiss the case. With respect to the objections to the Report and Recommendation, the Court said:

> After independently reviewing the transcript of the hearing on this matter, the file and record and relevant case law, the court agrees with the magistrate judge's recommendation that the RICO claims asserted against the defendants be

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1. Faced with the adverse Report and Recommendation, plaintiffs had previously taken the extraordinary step of requesting that the Magistrate Judge disqualify himself from the case and vacate his Report and Recommendation due to the fact that he had many years earlier represented one of the lawyers for defendant Dr. Turpie in an unrelated proceeding. This request was denied.

> dismissed with prejudice. Plaintiffs have failed to assert a viable RICO claim against defendants for any injuries allegedly sustained.[2]

Pet. App. B-4.

E. Eighth Circuit Affirmance

On December 24, 1997, plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Eighth Circuit. In their brief on appeal, plaintiffs attempted to return to the allegations they had made in their Second Amended Complaint and tried to deny that they had presented new factual matters to the Magistrate Judge at the oral argument. The Eighth Circuit was not persuaded. In its Opinion of August 11, 1999, the Court noted that during the argument before the Magistrate Judge, plaintiffs had "conceded that, under *Bowman*,[3] [plaintiffs] could not base a civil RICO claim on allegations of wrongful discharge, denial of promotion, loss of compensation or benefits, harassment or intimidation, or retaliation." Pet. App. A-5. The Court observed that "[c]ounsel for [plaintiffs] then argued that appellants had been defamed not because they had criticized

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2. After dismissal of their claims in the District Court, three of the plaintiffs instituted lawsuits against RPR in other courts. Plaintiff Hamm instituted suit in state court in Texas and trial is scheduled for February 2000. Plaintiffs Conolly and DeCembrino instituted suit against RPR in federal court in Philadelphia. Their claims are being held in civil suspense pending resolution of this case.

3. *Bowman v. Western Automobile Supply Co.*, 985 F.2d 383 (CA8), *cert. denied*, 508 U.S. 957 (1993), is the Eighth Circuit decision interpreting this Court's RICO direct injury requirement in the context of employee whistleblower cases.

or refused to participate in the illegal promotion of off-label uses and kickbacks, but instead because they had actually participated in the illegal scheme." Pet. App. A-5. As the court noted, "[t]his was the opposite of what was alleged in the second amended complaint." Pet. App. A-6.

Although noting the existence of alternative grounds for the District Court's ruling, the Eighth Circuit addressed those particular issues which plaintiffs raised, rejected plaintiffs' position, and affirmed the entry of summary judgment in favor of defendants. On November 9, 1999, plaintiffs filed their petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I. Certiorari On Plaintiffs' 1962(c) Claim Should Be Denied Because There Is No Meaningful Split Of Authority On The Issue Presented.

With respect to their RICO claim under § 1962(c), plaintiffs ask this Court to grant certiorari on one issue: whether plaintiffs can recover under RICO for injury to their reputations.

The RICO statute's civil enforcement provision provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of suit, including a reasonable attorney's fee.

18 U.S.C. § 1964(c). Thus, one element of every civil RICO claim is the existence of an injury to business or property. In the Courts below, plaintiffs argued that injury to reputation does constitute injury to "business or property;" defendants disagreed. The District Court held in defendants' favor, and the Eighth Circuit affirmed, holding that "[d]amage to reputation is generally considered personal injury and thus is not an injury to 'business or property' within the meaning of 18 U.S.C. § 1964(c)." Pet. App. A-19. This decision is consistent with common sense and a plain reading of the statute.

In this Court, plaintiffs seek certiorari claiming that there is a split of authority among the circuits. Plaintiffs' position is not correct. The decision of the Eighth Circuit below is in accord with the vast majority of circuit and district court decisions. *See Tsipouras v. W & M Properties, Inc.*, 9 F. Supp. 2d 365, 367-68 (S.D.N.Y. 1998) (injury to character or business reputation is not an injury to business or property under RICO); *City of Chicago Heights v. Lobue*, 914 F. Supp. 279, 285 (N.D. Ill. 1996) (injuries to business reputation are not injuries to business or property under 1964(c)); *In re Teledyne Defense Contracting Derivative Litigation*, 849 F. Supp. 1369, 1372 n.1 (C.D. Cal. 1993) (noting that injuries to business reputation are not cognizable under RICO); *Padilla Rodriguez v. Llorens Quiñones*, 813 F. Supp. 924, 929 (D.P.R. 1993) (holding that damages relating to injury to reputation are personal injuries not recoverable under RICO); *Callan v. State Chemical Mfg. Co.*, 584 F. Supp. 619, 623 (E.D. Pa. 1984) (holding that damages for mental anguish, loss of confidence and self-esteem, and harm to business reputations are not recoverable under RICO); *Mayes v. Local 106, International Union of Operating Engineers*, Case No. 93-CV-716, 1999 WL 60135

(N.D.N.Y. Feb. 5, 1999) (holding that injury to reputation is not injury to business or property); *see also Grogan v. Platt*, 835 F.2d 844, 847 (CA11) ("We agree that had Congress intended to create a federal treble damages remedy for cases involving . . . injury to reputation . . . or the like . . . it could have enacted a statute referring to injury generally, without any restrictive language.") (internal quotation marks omitted) (*quoting Morrison v. Syntex Laboratories, Inc.*, 101 F.R.D. 743, 744 (D.D.C. 1984)), *cert. denied*, 488 U.S. 981 (1988); *John Paul Mitchell Systems v. Eslami*, 110 F.3d 68, 1997 WL 143947 at *3 (CA9 1997) (Table; unpublished decision) ("claimed losses to . . . 'business reputation' . . . are not the type of injuries compensable under RICO") (*citing Teledyne*); *Bowen v. Oistead*, 125 F.3d 800, 806 (CA9 1997) (holding that injury to reputation does not "fall within the statutory definition of 'racketeering activity.' "), *cert. denied*, 118 S. Ct. 2343 (1998); *but see Sadighi v. Daghighfekr*, 36 F. Supp. 2d 279, 292 (D.S.C. 1999) (holding that damage to professional reputation is damage to business or property).

In support of their contention that there is a split in authority among federal courts of appeals, plaintiffs cite only *Khurana v. Innovative Health Care Sys., Inc.*, 130 F.3d 143 (CA5 1997), *vacated*, 119 S. Ct. 442 (1998). In so arguing, however, plaintiffs overlook that *Khurana* does not currently support any legal principles because it was vacated by this Court.[4] Indeed, in vacating the judgment in *Khurana* and remanding for dismissal this Court cited *United States v. Munsingwear*, 340 U.S. 36 (1950), a case which expressly notes that the effect of this Court's vacating a judgment below is to deprive that judgment of all precedential value. *Id.* at

4. On remand, the Fifth Circuit merely dismissed the case as moot, pursuant to this Court's order. *Khurana v. Innovative Health Care Sys., Inc.*, 164 F.3d 900 (1999).

39-40. Even if *Khurana* had not been vacated, moreover, its holding would not create a true split of authority requiring resolution by this Court. In *Khurana*, the issue presented to the Court was whether injury to reputation was a direct injury under RICO. 130 F.3d at 151. Indeed, there is no evidence in the opinion that the defendants ever raised the question of whether injury to reputation was injury to business or property. It is certain that the lower court did not decide this question. Thus, plaintiffs have attempted to create a split of authority where none truly exists and have utterly failed to give any explanation as to why the decision below is not correct.

Because plaintiffs have failed to cite a valid basis for this Court granting certiorari on this issue, the petition for certiorari should be denied.

II. Certiorari On Plaintiffs' 1962(d) Claim Should Be Denied Because Plaintiffs Withdrew Their Claim And Replaced It With One That Would Grossly Distort RICO.

With respect to plaintiffs' RICO claim under § 1962(d), plaintiffs again ask this Court to grant certiorari with respect to only one issue. They state the issue as one of standing to recover for injury caused by overt (non-predicate) acts in furtherance of a RICO conspiracy.

Plaintiffs note in their petition that this Court has granted certiorari in *Beck v. Prupis*, 119 S. Ct. 2046 (1999). Pet. 10. The question on which certiorari was granted in *Beck* is:

> Whether an employee who is terminated for both blowing the whistle on and refusing to participate

> in a pattern of predicate acts of racketeering forbidden by the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et seq., may assert a civil RICO conspiracy claim, where he has been injured by an overt act in furtherance of the RICO conspiracy, which overt act is not, itself, a predicate act of racketeering.

Petitioners claim that "[t]his case should be heard alongside *Beck v. Prupis*." Pet. 10.

There are several reasons why this Court should not grant certiorari on this issue. First, this case cannot be "heard alongside *Beck*." The *Beck* case has already been briefed and argued and is awaiting decision. At most, therefore, this Court could only "defer" or "hold" this petition pending the issuance of a decision in *Beck*. Even that action would be ill-advised, however, because *Beck* presents a wholly distinct issue from this case.

In *Beck*, the question is whether an employee terminated in furtherance of an alleged RICO conspiracy has stated a cause of action under § 1962(d) of RICO. Although such a claim was originally framed by the plaintiffs in this case in their Second Amended Complaint, the plaintiffs abandoned that claim in the District Court. Pet. App. C-11, C-17, C-18. In its place, and contrary to their Second Amended Complaint, plaintiffs told the Magistrate Judge that their claim was that they were participants in the alleged racketeering activities and that their reputations were diminished by this activity. Accordingly, in deciding the viability of plaintiffs' 1962(d) claim, the Magistrate Judge stated: "To support their RICO claims, Plaintiffs rely solely

on their allegation that, in 'in furtherance of Defendants' conspiracies,' RPR has 'damaged the business reputation of Plaintiffs in the pharmaceutical industry." Pet. App. C-17 – C-18. Consistent therewith, when plaintiffs filed their objection to the Magistrate Judge's Report and Recommendation, they stated again that "adverse employment actions" were not the basis of their RICO claims, but rather that those claims were based only on the so-called damage to their business reputations.

Thus, in this case, the issue critical to plaintiffs' RICO claim under § 1962(d) is whether persons who actively participate in the alleged racketeering activity can recover treble damages for reputational injuries. This Court has not been asked to decide that issue in *Beck*. As such, there would be no purpose in holding this case pending the decision in *Beck*.

Further, the peculiar claim that the plaintiffs present, as plaintiffs *and* participants in the alleged RICO scheme, is not one which merits review by this Court. The District Court below properly understood that permitting plaintiffs to participate in racketeering activity and then to sue for attendant reputational injury would be to distort grossly and to expand the reach of the RICO statute. Indeed, as the Magistrate Judge noted at the oral argument, given plaintiffs' theory, it would be impossible to draw a line among RPR employees as to who had a RICO claim and who did not. Indeed, under plaintiffs' theory, any employee working for a company that allegedly engages in racketeering activity would have a plausible claim for reputational injury by that employee's mere association with the company. Recovery under RICO for such a remote, indirect injury, however, is precisely what this Court rejected in *Holmes v. Securities*

Investor Protection Corp., 503 U.S. 258 (1992), and is precisely why the courts below properly dismissed plaintiffs' RICO claims.

III. Certiorari Should Be Denied Because Resolution Of The Two Issues Presented Would Be Advisory And Not Case Dispositive.

A third reason why this Court should not grant certiorari is because a decision by this Court on the questions raised in plaintiffs' petition would not be case dispositive. More specifically, as noted, *supra*, the District Court articulated four separate grounds for dismissal of the plaintiffs' claims. With regard to their § 1962(d) claim, plaintiffs have only appealed dismissal of that claim on the ground that they lacked standing to assert RICO conspiracy claims. The § 1962(d) claim was also dismissed, however, on the basis of the District Court's determination that, as participants in the allegedly illegal activities, plaintiffs cannot recover under RICO's treble damage remedy and cannot state a claim for reputational injury. Pet. App. C-20, B-10, A-6, A-7.

As to their § 1962(c) claim, plaintiffs only seek review of the lower courts' ruling that an injury to reputation is not an injury to business or property under § 1964(c). Both the District Court and the Court of Appeals, however, based their decision to dismiss the § 1964(c) claims on three other grounds: (1) that the injuries to reputation alleged by plaintiffs were indirect injuries, insufficient to confer standing to assert a substantive RICO claim, Pet. App. A-18 - A-19 (*citing Holmes*, 503 U.S. at 269-70), C-19; (2) that as participants in the alleged illegal conduct, plaintiffs were not eligible to seek treble damages, Pet. App. C-20, B-10, A-6, A-7; and (3) that plaintiffs could not claim to have had their reputations injured by defamation,

when they had admitted that the allegedly damaging things that had purportedly been said about them were, in fact, true, Pet. App. C-20.

Thus, as to both the § 1962(c) claims and the § 1962(d) claims, there are alternative and unappealed legal bases for decision. Moreover, plaintiffs have waived further review of these claims both by their failure to raise certain of them before the Eighth Circuit and by their failure to include them in their petition for certiorari. *See Anderson Marketing, Inc. v. Design House, Inc.*, 70 F.3d 1018, 1020 (CA8 1995) ("It is a fundamental rule of federal appellate procedure that we may only pass on a district court's ruling if a party challenges that ruling on appeal by raising the issue in the opening brief.") (*citing* Fed. R. App. P. 28(a)(2),(4)); Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

As this case involves questions of federal law, this Court has jurisdiction to consider these unappealed issues. *See, e.g., United States National Bank of Oregon v. Independent Insurance Agents of America*, 508 U.S. 439, 446-47 (1993). This Court frequently has held, however, that it is only in exceptional cases that it considers questions not raised in the courts below. *Holly Farms Corp. v. National Labor Relations Board*, 517 U.S. 392, 400 n.7 (1996); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 39 (1989); *Heckler v. Campbell*, 461 U.S. 458, 468-69 n.12 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). Similarly, the Court has held that only in exceptional circumstances will it consider questions that were waived below. *United States v. Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

This case presents no extraordinary circumstances that warrant resolution of otherwise waived issues. Indeed, as is apparent from the foregoing, this is a case in which plaintiffs have blithely changed their factual allegations after filing their complaints and abandoned or altered their claims as it suits them. Hence, the record below presents a very poor vehicle to decide any RICO issue and certainly presents no compelling reason why this Court should seek to review the decisions of the judges who heard and decided the case below.

CONCLUSION

For all of the foregoing reasons, respondent Rhône-Poulenc Rorer Pharmaceuticals Inc. respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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